No. 86-108

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARY HILTON Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. CARY EDWARDS, Attorney General
of New Jersey,

Petitioners,

-vs.-

DANA BRAUNSKILL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF OF PETITIONERS ON THE MERITS

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QUESTIONS PRESENTED

Are federal courts absolutely barred from considering issues such as a habeas corpus petitioner's dangerousness to the community and the likelihood that the order granting the writ will be reversed on appeal in deciding whether to stay release on habeas corpus pending appeal?

Is an interpretation of *Fed. R. App. P.* 23(c) which effectively extinguishes the State's right to appeal consistent with the comity concerns underlying this Court's opinions and the federal statutes concerning habeas corpus?

Does the Constitution require the immediate release of a successful habeas corpus petitioner notwithstanding the pendency of the State's appeal of the granting of the writ?

Whether the questions presented by petitioners to this Court should be considered moot although this case involves an issue that is "capable of repetition, yet evading review"?

PARTIES BELOW

All parties below are parties to this petition.

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NO. 86-108

GARY HILTON, Superintendent,
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Petitioners,

-vs.-

DANA BRAUNSKILL,

Respondent.

**On Writ of Certiorari To The
United States Court of Appeals
For The Third Circuit**

BRIEF FOR PETITIONERS

OPINIONS BELOW

The order of the United States District Court for the District of New Jersey, issued without a written opinion, is reproduced at JA-17 to 18.

The district court's stated reasons for denying the order are reproduced at JA-8 to 16.

The order of the United States Court of Appeals for the Third Circuit, which has not been published, and was

issued without written opinion, is reproduced at JA-21 to 22.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. sec. 2254, respondent petitioned for a writ of habeas corpus in the United States District Court for the District of New Jersey. Pursuant to 28 U.S.C. sec. 2243, the United States District Court for the District of New Jersey issued an order granting a writ of habeas corpus on February 27, 1986.

Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit under 28 U.S.C. sec. 2253 on March 20, 1986. On May 16, 1986, petitioners moved for a stay of respondent's release under *Fed. R. App. P.* 8(a) and 23(b), (c) and (d). This motion was denied on May 27, 1986. No petition for rehearing was sought.

This petition was filed within sixty (60) days of that date pursuant to Rule 20.1 and 20.4, Rules of the Supreme Court. The jurisdiction of this Court to review the order of the Third Circuit denying petitioners' motion for a stay is invoked under 28 U.S.C. sec. 2254(a), with *certiorari* to the United States Court of Appeals for the Third Circuit having been granted on October 14, 1986.

CONSTITUTIONAL PROVISIONS INVOLVED
AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against him-

self, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

STATUTES INVOLVED

United States Code, Title 18. Section 3141:

(a) Pending trial. A judicial officer who is authorized to order the arrest of a person pursuant to section 3041 of this title shall order that an arrested person who is brought before him be

released or detained, pending judicial proceedings, pursuant to the provisions of this chapter.

(b) Pending sentence or appeal. A judicial officer of a court of original jurisdiction over an offense, or a judicial officer of a Federal appellate court, shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained pursuant to the provisions of this chapter.

United States Code, Title 18, Section 3142:

(b) Release on personal recognizance or unsecured appearance bond. The judicial officer shall order the pretrial release of the person on his personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of his release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(e) Detention. If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial. In a case described in (f)(1), a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the judge finds that

(1) the person has been convicted of a Federal offense that is described in subsection (f)(1), or of a State or local offense that would have been an offense described in subsection (f)(1) if a circumstance giving rise to Federal jurisdiction had existed;

(2) the offense described in paragraph (1) was committed while the person was on release pending trial for a Federal, State, or local offense; and

(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the conviction, or the release of the person from imprisonment, for the offense described in paragraph (1), whichever is later.

Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), section 1 of the Act of September 15, 1980 (21 U.S.C. 955a), or an offense under section 924(c) of title 18 of the United States Code.

United States Code, Title 18, Section 3143:

(b) Release or detention pending appeal by the defendant. The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and

who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds--

(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142(b) or (c); and

(2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

If the judicial officer makes such findings, he shall order the release of the person in accordance with the provisions of section 3142(b) or (c).

(c) Release or detention pending appeal by the government. The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of section 3731 of this title, in accordance with the provisions of section 3142, unless the defendant is otherwise subject to a release or detention order.

United States Code, Title 28, Section 2101:

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

United States Code, Title 28, Section 2107:

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

United States Code, Title 28, Section 2243:

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

. . .

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

United States Code, Title 28, Section 2254:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

SUPREME COURT RULES

Rule 41. Custody of prisoners in habeas corpus proceedings

2. Pending such review of a decision failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may

be enlarged upon his recognizance, with or without surety, as may appear fitting to the court, Justice, or judge rendering the decision, or to the court of appeals or to this Court or to a judge or Justice of either court.

3. Pending such review of a decision ordering release, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court, Justice, or judge rendering the decision, or the court of appeals or this Court, or a judge or Justice of either court, shall otherwise order.

4. An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall govern review in the court of appeals and in this Court unless for reasons shown to the court of appeals or to this Court, or to a judge or Justice of either court, the order shall be modified or an independent order respecting custody, enlargement, or surety shall be made.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 8. Stay or Injunction Pending Appeal

(a) Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals.

Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is

not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

RULES INVOLVED

Rule 23. Custody of Prisoners in Habeas Corpus Proceedings

(a) Transfer of Custody Pending Review. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

(b) Detention or Release of Prisoner Pending Review of Decision Failing to Release. Pending review of a decision failing or refusing to release

a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

(c) Release of Prisoner Pending Review of Decision Ordering Release. Pending review of a decision ordering the release of a prisoner in such a proceedings, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

(d) Modification of Initial Order Respecting Custody. An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.

THIRD CIRCUIT COURT OF APPEALS INTERNAL OPERATING PROCEDURES
10P CHAPTER 5. OPINIONS

* * *

3. Time schedule for panel drafting and circulating opinions.

a. 60-day period for drafting opinion writing. The Administrative Office of the United States

Courts, pursuant to a resolution of the Judicial Conference of the United States, requires notification by the Clerk of all cases which have not been terminated within a prescribed time. The presiding judge of the panel is required to give an explanation for the delay. In order to effectuate this policy, the opinion-writing judge is expected to circulate a draft of his opinion within sixty (60) days after assignment.

b. 45-day period to file concurring or dissenting opinion. When one of the other two panel judges approves the draft opinion it becomes the proposed majority opinion. If the third judge desires to circulate a concurring or dissenting opinion, he is given forty-five (45) days to do so or to state that he wishes to be recorded as concurring or dissenting in the result. See also Section D.

STATEMENT OF THE CASE

Respondent was indicted on July 29, 1980, on charges of aggravated sexual assault in violation of N.J. Stat. Ann. 2C:14-2 (West 1982) and the unlawful possession of a knife in violation of N.J. Stat. Ann. 2C:39-5(d) (West 1982). He was tried before the New Jersey Superior Court, Law Division, on January 26 through January 30, 1981, and found guilty on both charges. On March 26, 1981, he was sentenced to an aggregate term of eight years in the New Jersey State Prison with a four-year parole ineligibility term. His convictions were affirmed by the New Jersey Superior Court, Appellate Division on December 14, 1982. His petition for certification was denied by the New Jersey Supreme Court on March 1, 1983.

Respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey on April 26, 1985. On February 27, 1986, the Hon-

orable Harold A. Ackerman, U.S.D.J., ordered that a writ of habeas corpus should be issued 30 days from that date. (JA-3). The basis of this writ was Judge Ackerman's ruling that the state courts had violated respondent's sixth amendment right to call witnesses in his defense by enforcing *New Jersey Court Rule* 3:11-1, which requires that defendants, upon request, inform the State of the identity of any alibi witnesses which they intend to present at trial. The court further ruled that failure to allow the alibi witness to testify did not constitute harmless error.

Petitioners filed a Notice of Appeal from this order on March 20, 1986. (JA-4 to 5). On March 26, 1986, petitioners moved for a stay of respondent's release on habeas corpus before the district court. (JA-6 to 7). Judge Ackerman denied this stay on the basis of the decision of the United States Court of Appeals for the Third Circuit in *Carter v. Rafferty*, 781 F.2d 993 (3d Cir. 1986). The district court noted that under the *Carter* opinion, it could not consider either respondent's dangerousness or the likelihood that the order granting the writ would be reversed on appeal in deciding whether to stay issuance of a writ of habeas corpus pending appeal. (JA-8 to 16, Tr 3-7 to 4-25; Tr 9-6 to 25; JA-17 to 18).

On May 16, 1986, petitioners moved before the United States Court of Appeals for the Third Circuit for a stay of the district court writ which ordered that respondent be released. (JA-19 to 20). This motion was denied on May 27, 1986. (JA-21 to 22).

This Court granted *certiorari* on October 14, 1986. (JA-23).

SUMMARY OF ARGUMENT

1. The courts below, relying on *Carter v. Rafferty*, 781 F.2d 993 (3d Cir. 1986), incorrectly construed *Fed. R. App. P.* 23(c) to bar consideration of a habeas petitioner's dangerousness and the chances of success of a state's appeal

in denying the state's request for a stay of respondent's release pending appeal. This construction of Rule 23(c) totally misreads the plain language of the rule and its history, which readily suggest that federal judges have broad discretion to evaluate various considerations—including dangerousness and chances of success on appeal—when deciding whether or not to immediately release a habeas petitioner. This Court's opinions, recognizing the important state interests underlying habeas corpus jurisprudence, further dictate that federal courts take account of vital state interests before releasing a habeas petitioner during the pendency of a state's appeal. Moreover, the Third Circuit's narrow reading of Rule 23(c) conflicts with common practice in the other federal circuits, where courts examine a wide range of state concerns in deciding whether to stay a habeas order releasing the petitioner pending the results of the state's appeal.

2. The opinion in *Carter v. Rafferty* erroneously suggests that upon a district court's decision granting a writ of habeas corpus, the successful petitioner is constitutionally entitled to be released from custody. Neither the historical underpinnings of habeas corpus nor concepts of due process mandate that the successful habeas petitioner be automatically released during the pendency of an appeal from the finding of a federal district court that the petitioner's adjudication of guilt was constitutionally invalid. Because of the unique procedural posture of the grant of a habeas writ at the district court level, keeping the petitioner in custody pending appeal is a valid continuation of punishment under due process principles. Alternatively, decisions of this Court suggest that continued detention of a habeas petitioner pending appeal does not constitute punishment and for this reason does not violate due process. Decisions of this Court also support the use of the habeas petitioner's dangerousness to the community as a valid consideration in the determination of whether to stay his release.

3. There is no doubt that the issue presented in this case is not moot at this time. Even if this case should become moot at a later date because of a decision on the merits of the underlying appeal by the Third Circuit Court of Appeals, the issue presented should be decided in this case. Because this issue must be submitted to this Court in the course of an ongoing appeal, it is clear that any appeal of this type may become moot pending resolution by this Court. This case presents an issue of extreme public importance which is "capable of repetition, yet evading review"; therefore, review by this Court continues to be warranted.

LEGAL ARGUMENT

POINT I. FEDERAL COURTS HAVE BROAD DISCRETION UNDER *FED. R. APP. P.* 23(c) TO CONSIDER NUMEROUS STATE INTERESTS IN DECIDING WHETHER TO STAY A HABEAS PETITIONER'S RELEASE PENDING APPEAL BY THE STATE.

Nowhere does the Constitution mandate that a prevailing habeas petitioner must be unconditionally released pending the State's appeal of the habeas order granting the writ. Nor is the automatic release following the issuance of a habeas order required by *Fed. R. App. P.* 23(c). Indeed, the plain language of this rule grants federal courts the discretion to determine the appropriateness of release. Moreover, the history of Rule 23(c) and its predecessor Supreme Court rules firmly demonstrates that dangerousness and the chances of the State's success on appeal of the habeas order should be considered by a federal court in exercising discretion whether to immediately release a prevailing habeas petitioner. This reasoned exercise of discretion is totally consistent with the statutory mandate to dispose of habeas matters as "law and justice require," and it fully recognizes the tension inherent in federal ha-

beas review—deference for the sovereign power of the various states, the need to preserve the state's unbridled right to appeal the issuance of a habeas writ, and federal supervision of the application of federal constitutional law in state court proceedings.

A. *Fed. R. App. P.* 23(c) Allows Federal Courts to Consider a Habeas Petitioner's Dangerousness and the State's Chances of Success on Appeal in Deciding Whether to Release a Successful Habeas Petitioner Pending Appeal by the State.

In refusing to stay respondent's release on federal habeas corpus pending appeal by petitioners, the lower federal courts declined to even consider petitioners' chances of success on appeal or respondent's dangerousness to the community at large These refusals were based on the very recent decision of the United States Court of Appeals for the Third Circuit in *Carter v. Rafferty*, 781 F.2d 993 (3d Cir. 1986). Petitioners assert that the standards set forth in that opinion are novel, in conflict with the opinions of other circuits, at odds with the customary practice and interpretation of controlling statutes, impractical and dangerous.

The starting point of the *Carter* opinion is the fact that a successful habeas corpus litigant is presumptively entitled to release under *Fed. R. App. P.* 23(c). *Id.* at 994. Petitioners, of course, would not contest this much of the opinion. Petitioners also agree with the portion of the *Carter* opinion that states that in order to gain release, a successful habeas corpus petitioner must assure the court of his presence at future federal court proceedings. *Id.* at 995. The *Carter* court, noting that it had little guidance save for the sparse wording of Rule 23, nonetheless went on to rule that the federal courts are prohibited from consideration of factors other than those related to flight in determining whether or not to immediately release a federal habeas corpus petitioner.

The *Carter* opinion, which the district court was required to follow, and which the Third Circuit refused to reconsider, is at variance with long-standing practice in the district of New Jersey, is not mandated by section 2254 of Title 28 of the United States Code and is not in consonance with Rule 23.

Rule 23 states in applicable part:

> (b) DETENTION OR RELEASE OF PRISONER PENDING REVIEW OF DECISION FAILING TO RELEASE. Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, *as may appear fitting to the court or justice or judge rendering the decision*, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.
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> (c) RELEASE OF PRISONER PENDING REVIEW OF DECISION ORDERING RELEASE. Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or without surety, *unless the court or justice or judge rendering the decision*, or the court of appeals or the Supreme Court, or a judge or justice or either court *shall otherwise order*.[1]

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[1] Subsection (d) of the Rule, which deals with modification of an initial order governing custody pending review, provides:

> (d) Modification of Initial Order Respecting Custody. An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall

Fed. R. App. P. 23 (emphasis added).

Sections (b) and (c) of Rule 23 each create presumptions that are dependent upon the outcome of the habeas corpus proceeding. Section (b) creates a presumption that if the writ is denied, the prisoner will remain in the same position concerning release as he was prior to the decision on his petition. That is, at the discretion of the court, he will be subject to continued incarceration unless the court feels that enlargement is appropriate under the circumstances. Section (c), on the other hand, creates a presumption that if a prisoner's conviction is found to have been obtained unconstitutionally or illegally, the prisoner will be enlarged pending review of the decision unless a federal court, judge or justice orders otherwise. Thus, it is presumed that a habeas petitioner who has prevailed will be released and that a non-victorious petitioner will remain incarcerated. See *Walberg v. Israel*, 776 F.2d 134, 135-36 (7th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 546 (1985). Nevertheless, at the discretion of the court, these sections permit the enlargement of a non-victorious petitioner and the continued incarceration of a victorious litigant. *Id.* at 136.

Sections (b) and (c) do not provide guidance as to what factors a court may consider in determining whether the presumptions contained in these sections have been overcome. The same interests relating to enlargement pending habeas review and to section (b), however, should also be considered under section (c). In *Iuteri v. Nardoza*, 662 F.2d 159 (2d Cir. 1981), the Court ruled that absent a showing that the habeas petition has raised "substantial claims" which presented a "likelihood of success," enlargement pending review of a denial of habeas corpus was inappropriate. *Id.* at 161. Moreover, the *Iuteri* court considered

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be made.

Id.

the issue of petitioner's dangerousness to the community. *Cf. Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972); *Baker v. Sard*, 420 F.2d 1342, 1343-44 (D.C. Cir. 1969); *Johnston v. Marsh*, 227 F.2d 528 (3d Cir. 1955). Likewise, factors such as the government's chances of success on appeal and the dangerousness of the prisoner should be considerations under section (c).

Congress, in enacting Rule 23, relaxed the standards that formerly appeared to mandate the release of a successful habeas litigant. The Third Circuit recognized this fact in *United States ex rel. Thomas v. New Jersey*, 472 F.2d 735 (3d Cir. 1973), *cert. denied*, 414 U.S. 878 (1973), in which the court noted that in 1886 the United States Supreme Court issued the following order:

> Order, that the following regulations be established under section 765 of the Revised Statutes:
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> **RULE 34.**
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> **CUSTODY OF PRISONERS ON HABEAS CORPUS.**
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> * * * * *
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> 3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, or special reasons, sureties ought not to be required. 117 U.S. 708.

Thomas, 472 F.2d at 742. The *Thomas* court noted that at that time the present equivalent to Rule 34(3) was Rule 49(3) (now Rule 41(3)) of the Supreme Court Rules. 472 F.2d at 742. The *Thomas* Court then stated:

> When in 1967 the Supreme Court promulgated the Federal Rules of Appellate Procedure, it included in Rule 23 a rule identical in language with its own Rule 49. Thus, Rule 23(c) is the

> direct succession from the original Supreme Court Rule 34(3) adopted in 1886. Even though until 1957 it appeared in the Supreme Court rules, at all times it has dealt with the duty of the district courts in habeas corpus cases. In 1886 the language requiring the enlargement of the successful habeas corpus petitioner was mandatory. The only discretion was in deciding whether a surety on his recognizance ought to be required. The mandatory language with respect to enlargement of the successful petitioner was carried forward until 1967. In that year, however, Rule 49(3) was revised to provide that the successful petitioner "shall be enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or this court, or a judge or justice of either court, shall otherwise order." The revised language was carried into Rule 23(c), Fed.R.App.P.
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> Thus from 1886 to 1967 a judge granting habeas corpus relief was under a flat mandate to enlarge the petitioner pending appeal. . . . [I]t is clear from the history of the rule prior to the 1967 change that there is still a very strong presumption that a petitioner holding a final judgment that his detention is unlawful should not be left in state custody. The 1967 change was not intended to adopt a general rule in favor of custody pending appeal, but only to substitute discretion, to be exercised in limited situations, for what was formerly a mandatory release requirement. *See* E. Bosky and E. Gressman, The 1967 Changes in the Supreme Court's Rules, 42 F.R.D. 139, 161 (1967).

Thomas at 742-73.

Based on this history, respondent's argument that reliance should not be placed on cases decided before the adoption of Rule 23(c) is misdirected. Certainly if it was permissible to take into consideration factors such as dangerousness and the chances of success on appeal under a rule which normally mandated release, it is appropriate to take these factors into consideration under the present rule which is intended to provide more discretion. *See Lewis v. Henderson*, 356 F.2d 105 (6th Cir. 1966); *Walberg v. Israel*, 776 F.2d at 136; *but see Thomas*, 472 F.2d at 743.

The *Thomas* decision, which was followed by the *Carter* court, then stated that the additional discretion was provided merely to enable the federal courts to ensure the petitioner's continued availability. In reaching this conclusion the court first noted that Rule 23(c) no longer contains the express language, contained in Rule 34, which mandated that surety could be required only "for appearance to answer the judgment of the appellate court." The court then found that "no change in substance was intended." *Id.* at 743. Thus, according to the Third Circuit, the change meant nothing.

This holding contradicts the earlier portion of the *Thomas* opinion which holds that the change was intended to provide more discretion than had originally been permitted. It also contradicts the main authority relied on by the court, Bosky and Gressman, *The 1967 Changes in the Supreme Court's Rules*, 42 F.R.D. 139 (1967). Bosky and Gressman explain, "The amendment gives a measure of discretion to continue detention of the prisoner pending appeal *when this seems desirable* despite the ruling in his favor." *Id.* at 161 (emphasis added).

Petitioners suggest that the change was not meaningless and that the rule permits all federal courts to consider factors such as dangerousness, the chances of reversal on appeal, the chances that defendant would be convicted on retrial and the burden that release would place on the

State. *See Clark v. Rose*, 611 F.Supp. 294 (M.D. Tenn. 1984) (considering time necessary for appeal, period of incarceration, and the burden on the state should petitioner be released; refusing to grant release of successful petitioner pending appeal by the state), *aff'd*, 762 F.2d 1006 (6th Cir. 1985), *rev'd on other grounds*, ___ U.S. ___, 106 S. Ct. 3101 (1986); *cf. Tate v. Rose*, 466 U.S. 1301 (O'Connor, Circuit Justice, 1984) (staying order granting release of a successful habeas petitioner pending petition by the state; in reversing the order, Justice O'Connor considered the likelihood of a successful petition, the burden of incarceration, and the burden that release and retrial would impose on the state), *aff'd*, 467 U.S. 1249 (1984) (refusing to vacate stay).

The Third Circuit noted that its opinion in *Carter* conflicted with the prevailing authority. 781 F.2d at 997 n.5. The *Carter* court diverged from the opinions of the other circuits for two reasons. First, these opinions referred to the term "bail," and the *Carter* court found that "the term 'bail' in the federal habeas corpus context is a misnomer." *Id.* Secondly, the Third Circuit found that it had no explicit authority to consider the factors considered by the other circuits due to the fact that it was "provided not with a detailed statutory scheme concerning the disposition of prisoners fully subject to federal authority, but rather a sparsely worded rule . . . ." *Id.* Petitioners suggest that the rule in question entrusts the federal courts with the discretion to consider all factors which have an impact on the decision to immediately release a state prisoner. Nevertheless, in this case, the district court has relied on, and the Third Circuit has refused *en banc* reconsideration of, a recent opinion in which the court itself noted it had created a conflict among the circuits, and which was based solely on its reading of a "sparsely worded rule" which has not been interpreted by this Court. In so doing it has imposed an unduly restrictive interpretation on the rule in question.

Section (d) of Rule 23 supports an interpretation of sections (b) and (c) which permits consideration of a wide range of interests.[2] Section (d) specifies that the original order entered under sections (b) and (c) shall govern review unless special reasons for modification of the order are shown to either the court of appeals or the Supreme Court. Again, there is no explanation of what "special reasons" may be considered by the reviewing court. However, common sense would indicate that the reviewing court's analysis of the chances that the lower court order will be reversed on appeal and of the dangerousness of the prisoner would be among these considerations. The *Carter* court's ruling (which was followed by the district court and the circuit court in this case), that the prisoner's continued availability to respond to federal process or issues which relate to some other federal interest are the sole criteria which may be considered, is in conflict with the decisions of two other circuits. In *Walberg v. Israel*, the court found that Rule 23(c) contained a rebuttable presumption that upon a grant of habeas corpus the petitioner should be released. As the court explained (citing the Third Circuit's opinion in *Thomas*), this presumption "dates from an era, now far past, when habeas corpus lay only to test the jurisdiction of the detaining authority." *Walberg*, 776 F.2d at 136. Clearly, at that time it was necessary to

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[2] The *Carter* opinion dwelled heavily on those factors that might constitute "special reasons" to modify an initial order respecting custody under Rule 23(d). The court, without full discussion, summarily determined that the "special reasons" necessary for modification of an initial custody order were also necessary for an order denying release pursuant to Rule 23(c). *See Carter*, 781 F.2d at 995 n.4. There is no reason for this construction. The "special reasons" language of section (d) of Rule 23 clearly refers to "special reasons" for modification of an initial order, whereas Rule 23(c) does not refer to any special reasons, and thus arguably affords federal courts greater discretion to stay a petitioner's release pending resolution of the State's appeal. Thus, the concerns properly considered under section (d) may *a fortiori* properly be considered under the broader section (c).

release a petitioner upon a finding that there was no jurisdiction to detain him. The court found "now that habeas corpus is used as a method of correcting a broad range of constitutional errors . . ." the presumption can easily be overcome by a showing that the petitioner is likely to be reconvicted. *Id.*

Similarly, in *Lewis v. Henderson*, 356 F.2d at 106, in determining whether to release a habeas petitioner pending appeal of a district court decision granting habeas corpus, the court ruled that it was not required "as a matter of right" to order petitioner's release. The court decided not to release petitioner under the facts and circumstances of that case. *Id.* at 106. These circumstances included the petitioner's conviction of assaults with intent to commit murder and the certainty of retrial if the state's appeal failed. *Id.* Nor do these cases stand alone. A number of district courts have considered similar factors in determining whether a successful habeas petitioner would be released. Indeed, as the Third Circuit admitted in *Carter*, the United States District Courts for the District of Delaware (a state within the Third Circuit) and the Southern District of Texas specifically have found dangerousness to be a proper consideration in determining whether to release a successful habeas corpus petitioner. *United States ex rel. Taylor v. Redman*, 500 F. Supp. 453, 459 (D. Del. 1980); *Sellars v. Estelle*, 450 F. Supp. 1262, 1265 (S.D. Tex. 1978), *aff'd*, 591 F.2d 1208 (5th Cir. 1979); *Cf. Hill v. Rose*, 579 F. Supp. 1080 (M.D. Tenn. 1983). These courts have found that bail-type considerations are appropriately weighed when considering release on appeal following a successful petition for release on habeas corpus.[3]

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[3] Some lower federal courts have granted the state's stay request but simultaneously released the petitioner on a bail that the petitioner could meet. *Hill v. Rose*, 579 F. Supp. 1080, 1090-91 (M.D. Tenn. 1983); *Cagle v. Davis*, 520 F. Supp. 297, 312-13 (E.D. Tenn. 1980), *aff'd*, 663

Petitioners assert that the Third Circuit's interpretation fails to pay heed to the clear intent of the rule in question and creates an unnecessary and intolerable danger to the community. It is simply not wise or necessary to require federal courts to blindly order the release of state prisoners in situations in which the prisoner is shown to be a danger to the community and the chances of reversal on appeal are great.

B. Habeas Corpus Jurisprudence Dictates That Federal Courts Consider Vital State Interests in Deciding Whether to Grant Release Pursuant to Rule 23(c).

The *Carter* opinion's rigid and misguided interpretation of Rule 23(c) disregards the panoply of significant state interests that this Court has suggested must be weighed in evaluating the remedy to be afforded to successful habeas applicants. Title 28 U.S.C. sec. 2243 directs a trial court in a federal habeas proceeding to dispose of the matter "as law and justice require." When fashioning the appropriate relief for a habeas petitioner, this Court has instructed that the remedy should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing state interests and the public's interests. *United States v. Morrison*, 449 U.S. 361,

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F.2d 1070 (6th Cir. 1981). This seemingly inconsistent result reflects the confusion as to the scope of relief to be afforded a successful habeas petitioner and the criteria to be applied to assess the state's stay request. Where the habeas petitioner is shown to be dangerous, this form of relief serves no legitimate public purpose, since it amounts to an outright discharge. Not only does fixing a low bail virtually gut the import of a simultaneous order staying issuance of the habeas order, but more significantly, it affords the public no protection against an individual demonstrated to be dangerous. In short, while traditional bail procedures arguably might be invoked to guarantee against the flight of a habeas petitioner during the pendency of the state's appeal of the writ, *Carter v. Rafferty*, 781 F.2d at 997, they simply have no place when the state's request is based on a showing that the petitioner represents a danger to the community and that there is a likelihood of success on appeal.

364-65 (1981); *Galloway v. Stephenson*, 510 F. Supp. 840, 844-45 (M.D.N.C. 1981). At minimum, the law and justice standard embodied in section 2243 compels a district court to consider the habeas petitioner's dangerousness to the community and the chances that the order granting release will be reversed on appeal, in order to vindicate the interests of the state and the public before imprudently releasing the state prisoner from custody pending appeal. *Cf. Tate v. Rose*, 466 U.S. at 1303-04 (considering both chances of reversal and the state's burden if forced to release or retry).

Mechanically relying on the faulty standard set forth in *Carter*, the district court and the Third Circuit refused to stay respondent's release pending appeal without contemplating the important state interests that should have been weighed. The rulings below, in effect, rendered meaningless the state's right to appellate review of the order granting the habeas writ—a result that cannot be countenanced. *Hill v. Rose*, 579 F. Supp. at 1090. When the normal course of appellate review might otherwise cause the state's case to become moot, issuance of a stay is warranted. *Garrison v. Hudson*, 468 U.S. 1301, ___, 104 S. Ct. 3496, 3497 (Burger, C.J., Circuit Justice, 1984); *see In re Bart*, 82 S. Ct. 675 (Warren, C.J., Circuit Justice, 1962). Moreover, because the state's ground for appeal often may touch upon wide-reaching issues that affect large numbers of potential habeas petitions, the state is entitled to adequate time to obtain appellate review unhampered by the necessity of dealing with the problems incident to the possibility of new trials. *Grigsby v. Mabry*, 583 F. Supp. 629, 631 (E.D. Ark. 1983), *modified on other grounds*, 758 F.2d 226 (8th Cir. 1985), *rev'd on other grounds sub nom. Lockhart v. McCree*, ___ U.S. ___, 106 S. Ct. 1758 (1986). Additionally, in many cases the state would be forced to go to retrial without the benefit of evidence which a district court has ruled inadmissible on fourth,

fifth or sixth amendment grounds even though the district court's ruling in this regard is being reviewed on appeal.

The practical effect of the district court's habeas order in this case seriously jeopardizes the state's right to unfettered appellate review. Under the district court's order, the writ granting respondent's release from custody would be issued within 30 days unless the state took steps to retry him.[4] This mandate, coupled with the lower courts' refusal to issue the requested stay of respondent's release in direct response to the *Carter* decision, left petitioners with an intolerable Hobson's choice. The state could not hold petitioner without reinitiating a criminal prosecution. *See* N.J. Ct. R. 2:9-4, 3:26-1, 3:26-2. If petitioners moved for a retrial, however, their right of appeal effectively would be extinguished, because a federal court, bound by considerations of comity, would have to refrain from entertaining the appeal to avoid disrupting the on-going state criminal prosecution. *Stefanelli v. Minard*, 342 U.S. 117, 123-24 (1951); *United States ex rel. Abate v. Malcolm*, 522 F.2d 826, 827 (2d Cir. 1975); *Garrison v. Hudson*, 468 U.S. at ___, 104 S.Ct. at 3497. Consequently, petitioners'

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[4] When a habeas court finds error rendering a state judgment constitutionally infirm, immediate release from custody is rarely awarded as relief, and when it is, appellate courts have found abuse of the district court's discretion. *Hammontree v. Phelps*, 605 F.2d 1371, 1380-81 (5th Cir. 1979); *Ridge v. Turner*, 444 F.2d 3, 5-6 (10th Cir. 1971). The common practice in the district court is to order the prisoner's release within a specified time unless the defect identified by the district court is corrected before the time has elapsed—usually by a new trial. *Fisher v. Rose*, 757 F.2d 789, 791 (6th Cir. 1985). As the *Carter* court noted, a habeas writ ordinarily gives the state 60 to 90 days to correct the constitutional error, compared with the mere 30 days permitted by the district court here. *Braunskill v. Hilton*, 629 F. Supp. 511, 526 (D.N.J. 1986); *Carter v. Rafferty*, 781 F.2d at 994 n.1. However, the district court may and often does stay its judgment pending review by the appellate courts. *Rudolph v. Powell*, 478 F. Supp. 849, 852 (E.D. Wis. 1979); *United States ex rel. Sullivan v. Cuyler*, 553 F. Supp. 1236, 1243 (E.D. Pa. 1982), *aff'd*, 723 F.2d 1077 (3d Cir. 1983).

right to appeal would be mooted. On the other hand, if petitioners elected to pursue the appeal,[5] then respondent would be released after 30 days, even though he may have posed a danger to the community and the state likely would prevail on appeal. This scenario needlessly places communities at risk, and disdainfully regards the legitimate interests in public safety. *See generally Tate v. Rose*, 466 U.S. at 1304. By leaving the state with the repugnant option of having its appeal effectively mooted in order to possibly retain respondent in custody, the district court and the Third Circuit, relying on *Carter*, have made a mockery of the law and justice standard for habeas disposition. *See* 28 U.S.C. sec. 2243.

The significance of a state's right to appeal the order of a single district court judge cannot be overlooked in determining whether requirements of "law and justice" mandate release of all successful petitioners who do not present a risk of flight. *See* 28 U.S.C. sec. 2243; *Fed. R. App. P.* 23(c). A meaningful right of review for a state when a prisoner's conviction has been found invalid is consistent with the law of habeas corpus as it has developed in our system of federalism. The developments, both legislative and judicial, recognize the importance of comity. To the extent that a grant of a writ by a district court is held to require release, regardless of the merits of a state's appeal and the dangerousness of the petitioner, the right of appeal is diminished in derogation of principles of comity and finality that have shaped the development of the law defining the scope of the writ and in derogation of the federal interest in uniform application of federal constitutional law.

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[5] The state here timely perfected its appeal on March 20, 1986, within 30 days of the district court's conditional release order, in compliance with 28 U.S.C. sec. 2107. (JA-4 to 5). Although petitioners perfected the appeal, respondent was released from state custody on May 20, 1986. (JA-21 to 22).

Deference for state courts is reflected in numerous tenets of habeas corpus law. A petitioner may not seek relief from state custody unless he has a federal claim. 28 U.S.C. sec. 2254. No writ may issue unless the petitioner has "exhausted the remedies available in the courts of the state . . . ." 28 U.S.C. sec. 2254(b). Factual determinations of a state court are presumed to be correct. 28 U.S.C. sec. 2254(d). The exhaustion doctrine is one "designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings . . . ." *Rose v. Lundy*, 455 U.S. 509, 518 (1982). Similarly, the stated "cause and prejudice" standard applicable to procedural defaults by state prisoners is one that recognizes the cost of federal habeas review—"a reduction in the finality of litigation and frustration of 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights'. . . ." *Murray v. Carrier*, ___ U.S. ___, 106 S. Ct. 2639, 2645 (1986) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)).

Petitioners submit that the *de facto* restrictions that the Third Circuit approach to Rule 23(c) places on the state's right to appeal a grant of habeas are in derogation of and inconsistent with the deference to state court decisions that has shaped the developing contours of habeas corpus jurisprudence. In forcing a state to the choice of retrial, or appeal and the automatic release of a prisoner found guilty after a proceeding held valid in state court, the Third Circuit opinion gives too little deference to interests of comity and finality. A standard that would permit the district court who granted the writ or an appellate court to consider the likelihood of a state's success on appeal and the dangerousness of the person to be released would be more consistent with the principles that shape the scope of the writ. Other remedies, such as expedited disposition of appeals from orders granting the writ, would better balance the admittedly valid concerns of a prisoner whose confinement has been found to be constitutionally imper-

missible by a single district court judge against the legitimate state interests at stake. See, *e.g.*, *United States ex rel. Rice v. Vincent*, 486 F.2d 215, 216-17 (2d Cir. 1973) (reversing district court's order granting release pending appeal by the state and ordering briefing and argument on the appeal on an expedited basis); *cf. Johnson v. Scully*, 563 F. Supp. 851, 881 (E.D.N.Y. 1983) (Appendix B; opinion dated March 28, 1978) (where relief was due petitioner and the appeal process had been delayed by the state, release was appropriate).

Federal interests would also be better served by a construction of Rule 23(c) that would not deter appeals of orders granting the writ. Scholars have recognized that the writ facilitates this Court's interest in uniform application of federal law in the 50 states, an interest which this Court, with its limited resources, cannot serve by review of occasional state court judgments on direct review. *See, e.g.*, L. Yackle, *Postconviction Remedies* sec. 20 at 95-96 (1981). The interest is served by this Court's ability to "keep abreast of decisions in the eleven circuits." *Id.* at 96 (citing *Symposium—Habeas Corpus: Proposals for Reform*, 9 Utah L. Rev. 18, 27-30 (1964) (remarks of Professor Freund)), and *Stone v. Powell*, 428 U.S. 465 (1976) (Brennan, J., dissenting)). To the extent that a difficult choice of remedies leads a state to refrain from an appeal of a habeas grant that presents difficult or unsettled constitutional claims, the interest in uniform application of federal law is undermined. A decision on a claim adjudicated in a state court system is, in effect, reversed by a single district court judge. The problem of uniform application of federal law in the states becomes one of uniform application by federal district court judges.

In sum, interests in comity, finality and uniformity militate against a construction of Rule 23(c) that, like that of the Third Circuit, will discourage a state from appealing the grant of a writ. The "law and justice" require otherwise. 28 U.S.C. sec. 2243.

Fundamental fairness to the state and the general public dictates that federal courts evaluate additional factors, especially proofs of dangerousness, when they decide whether to release a habeas petitioner pending appeal of the issuance of a habeas writ. Yet, the Third Circuit, inexplicably swayed more by formalistic legal niceties than pure common sense, determined that dangerousness simply was irrelevant to the Rule 23(c) inquiry, presumably because a released habeas petitioner's risk to the community implicated a state rather than a federal interest. *Carter*, 781 F.2d at 997 & n.5. Quite to the contrary, a federal district judge would openly defy the law and justice standard set forth in 28 U.S.C. sec. 2243 and gravely disserve the public by casually releasing a prevailing habeas petitioner pending the state's appeal of a habeas order in the face of a showing that the petitioner constituted a public safety risk.

Dangerousness has been recognized as a factor appropriate to release decisions in analogous contexts. The Bail Reform Act of 1984 permits consideration of dangerousness as a factor relevant to a release decision pending trial, 18 U.S.C. sec. 3142(b), pending sentence and appeal by the defendant, 18 U.S.C. sec. 3143, and pending appeal by the government of various appealable orders, 18 U.S.C. sec. 3143. *See* 18 U.S.C. sec. 3143 (where the government appeals an order that is appealable pursuant to 18 U.S.C. sec. 3731, the release decision is made according to the standards applicable to pretrial release, sec. 3142). The legislative report accompanying the Bail Reform Act of 1984 is instructive. In the context of post conviction bail, the report notes, "release of a criminal defendant into the community after conviction may undermine the deterrent effect of the criminal law . . . ." S. Rep. No. 225, 98th Cong., 1st Sess. 26, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3209. Even prior to conviction, however, "the need to consider community safety in setting nonfinancial pretrial conditions of release . . ." is listed as the first in a series of problems the Bail Act of 1984 is

designed to address. *Id.* at 3, 1984 U.S. Code Cong & Ad. News at 3185.

Given this recognition of the propriety of consideration of dangerousness in other contexts, it seems anomalous for the federal system, despite concerns of comity, to refuse to consider dangerousness where a state seeks review of a grant of a writ of habeas in a case where the appeal represents a serious effort on the part of a state to rectify an erroneous grant of the writ. The open-ended language of Rule 23(c), which provides for release unless the court determines otherwise, does not require such an inconsistent approach to an analogous problem.[6]

The Third Circuit approach to release pending review of a decision granting the writ, furthermore, does not comport with common practice. Implicit in the numerous grants of stays of the writ that are issued without reasoned discussion, is a recognition of the fact that courts do consider a wide range of state concerns, at least wider than the risk of flight, in evaluating whether the total circumstances warrant an order that does not direct "release." *See Tate v. Rose*, 446 U.S. at 1304; *Rice*, 486 F.2d at 216 (and unpublished opinions of the Second Circuit cited therein); *Rudolph v. Powell*, 478 F. Supp. at 852 (court stays the habeas order 90 days to allow the state to retry the petitioner or, alternatively, if an appeal is taken, the order is stayed pending appeal); *Kennedy v. Pinkney*, 473 F. Supp. 1279, 1285 (C.D. Ill. 1979); *Shaffer v. Clusen*, 518 F. Supp. 963, 965 (E.D. Wis. 1981) (if the state elects to appeal a habeas order, "the execution of the writ will be stayed pending the results of the appeal").

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[6] Concededly the analogy is not perfect. Pending review of an order granting a writ, a successful petitioner is neither in the position of one awaiting trial nor in the position of one who is challenging a conviction on direct appeal. The Bail Reform Act of 1984 does not address the more analogous situation—the criteria for release of a federal prisoner during the pendency of a government petition for *certiorari* following reversal of a conviction by a federal court of appeals.

The lack of reasoned discussion in this context is indicative of the need for this Court to specify the considerations that are relevant to the complex decision required under Rule 23(c). In doing so, petitioners respectfully submit that the Court should look to the complex of factors relevant to the discretion granted. *See* Boskey & Gressman, *The 1967 Changes in the Supreme Court Rules*, 42 F.R.D. 139, 161 (1967) (noting that the 1967 amendment to Supreme Court Rule 49 gave "a measure of discretion to continue detention" pending appeal "when this seems desirable despite the ruling in his favor," and suggesting considerations of special characteristics, *i.e.*, physical or mental condition, that make detention "appear advisable"). As these concerns harmonize with those addressed by Rule 8 of the Federal Rules of Appellate Procedure, the rules should be construed in a similar fashion, taking account of diverse interests involved where the language of a rule granting discretion is sparse.[7] Under Rule 8(a), factors such as irreparable injury to the party seeking the stay unless it is granted, lack of harm to other persons and no harm to the public interest must be shown by the moving party to obtain a stay of a judgment. *See Hill v. Rose*, 579 F. Supp. at 1090 (applying *Fed. R. App. P.* 8(a) in the context of habeas; the court later ruled that Rule 8(a) was inapplicable and went on to set bail in an amount that the defendant was previously unable to meet). The language of Rule 8(a) itself authorizes but does not guide the exercise of discretion in granting stays. *See Fed. R. App. P.* 8(a).

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[7] In this regard, the number of cases addressing release pending appeal of habeas decisions as issues involving stays are significant. *See Grigsby v. Mabry*, 583 F. Supp. at 631; *United States ex rel. Rice v. Vincent*, 486 F.2d 215 (2d Cir. 1973) (reversing district court order granting release of successful habeas petitioner pending the state's appeal and staying order of district court; further noting that factors cited by the district court as relevant to the fact that flight was unlikely were present when the prisoner committed serious crimes).

Federal courts frequently have construed court rules that grant but do not guide the exercise of discretion to provide for consideration of all relevant concerns. For example, in *Carbo v. United States*, 82 S. Ct. 662 (1962), Justice Douglas, sitting as Circuit Justice, noted the sparseness of the language of Rule 46(a) of the Federal Rules of Criminal Procedure, which then governed bail pending appeal, and reversed the court of appeals' grant of bail under a narrow reading of the rule. *Id.* at 666. Justice Douglas further held that the safety of the community and the dangers of flight were important concerns. *Id.* (reversing grant of bail despite extreme likelihood of defendant's success on appeal); *see also California v. Harris*, 468 U.S. 1303 (Rehnquist, Circuit Justice, 1984). The broad and unspecific grant of discretion to deny release to a successful habeas petitioner, like other federal court rules, should be construed in light of the interests involved. In the case of Rule 23(c), those interests require a construction that would permit continuation of confinement pending resolution of a non-frivolous appeal by the state.

C. Petitioners Were Entitled to Show Respondent's Dangerousness to the Community and their Likelihood of Success on Appeal.

Petitioners were given no opportunity whatsoever to press any claim concerning their chances of success on appeal while arguing before the district court for a stay of respondent's release. (See JA-8 to 16, Tr 7-4 to 11).

In this regard, it should be remembered that the New Jersey Superior Court, Appellate Division, agreed with the district court that the trial judge may well have committed error in not allowing respondent to present an alibi witness. That court ruled, however, that under the facts of this case any such error was harmless. This is precisely the argument which we have presented in the appeal which is now pending before the Third Circuit.

The state court found that the properly introduced evidence led "overwhelmingly and inexorably to the conclusion of defendant's guilt." (Third Circuit Motion Appendix at 99). This evidence included the fact that two unrelated eyewitnesses made unhesitating and clear identifications of respondent. The victim gave a description of respondent which was corroborated by the eyewitnesses and identified respondent in court. Most importantly, respondent himself admitted on cross-examination that he was in the immediate vicinity of the scene of the crime within one-half hour of the time when the crime occurred. (Third Circuit Motion Appendix at 101 to 102). Based on these facts, the Third Circuit should reach the same result as the New Jersey court and petitioners should prevail on appeal.

Respondent has argued that petitioners were given a full and fair opportunity to argue the issue of dangerousness. This argument is strained. The transcript of the stay hearing before the district court indicates that the State repeatedly attempted to argue dangerousness and that the court repeatedly refused to consider this issue. The only issue the court considered was the possibility of flight. (JA-8 to 16; Tr 7-14 to 15; Tr 8-30 to 9-10; Tr 9-14 to 17; Tr 13-6 to 13). The opportunity to present an issue which the court feels it cannot consider and which the court does not consider can hardly be considered "a full and fair opportunity to substantiate" a claim. (Respondent's brief in opposition to *certiorari* at 4-12 to 13).

Apart from the present offense, respondent was convicted of the crimes of burglary and theft. Thus, the present crime is not the only serious crime of which respondent has been convicted. Moreover, the evidence in the present case demonstrated that respondent attacked a 69-year-old woman in her apartment building, grabbed her by the throat and threw her to the floor while she pleaded with him to just take her money. Respondent placed a knife to the victim's throat. When she struggled to avoid having her throat slit, she was cut on both hands. Respondent

then forced the victim to perform fellatio. Petitioners believe that these facts, in conjunction with respondent's record, demonstrate his dangerousness. At the very least, they are factors which should have been considered by the federal courts.

POINT II. THE CONTINUATION OF A SUCCESSFUL HABEAS PETITIONER'S DETENTION NEITHER UNDERMINES THE PURPOSES OF HABEAS CORPUS NOR VIOLATES DUE PROCESS.

Respondent has argued that a stay of a successful habeas corpus applicant's release pending review violates both the purposes of habeas corpus and the tenets of due process. (Respondent's Brief In Opposition to Petition for *Certiorari* at 9-10). We respectfully suggest that the granting of a writ of habeas corpus does not require the immediate release of a petitioner. Moreover, neither fundamental fairness nor due process are violated if a stay of release is granted in such a situation.

In *Carter v. Rafferty*, the Third Circuit Court of Appeals suggested that continuing the incarceration of a successful habeas petitioner pending appeal of the granting of the writ is somehow fundamentally unfair, and that where there is no evidence that the petitioner will not appear for further federal proceedings, the petitioner is entitled to release. *Carter*, 781 F.2d at 994. This suggestion is contrary to the historical underpinnings of habeas relief, the unique procedural posture of a grant of a habeas application and the formulae of due process as developed by this Court.

As noted in Point I, the presumption of release contained in the predecessors to Rule 23(c) has its origins in an era when habeas corpus lay only to test the jurisdiction of the detaining authority. *Walberg v. Israel*, 776 F.2d at 136. Where a determination is made that there is no jurisdiction to detain a habeas applicant, he is entitled to

unconditional release unless the order to release him is reversed by a higher court. Hence, the concept that a habeas litigant should be released was not based on any constitutional underpinning, but followed from the finding of a lack of jurisdiction by the court that adjudicated guilt. *Id.*; *see Preiser v. Rodriguez*, 411 U.S. 475, 485-87 (1973).

In later years, habeas corpus was invoked as a method of rectifying constitutional errors in state criminal trials. In such cases there is obviously no jurisdictional infirmity to continued custody. *Walberg v. Israel*, 776 F.2d at 136. Therefore, the Constitution no more requires the release of a successful habeas corpus petitioner pending appeal by the state than it requires release of a person who has prevailed on appeal pending further appeal by the government. *Id.* The absolute release of such a person is simply not constitutionally mandated; rather, it is permitted by means of statutes, court rules and tradition. *See Preiser*, 411 U.S. at 484, 486.

The existence of exceptions to the presumption of release contained in Rule 23(c) bear out the fact that immediate release is not mandated upon the grant of a writ of habeas corpus. As noted in Point I, the rule presumes that release will be granted "with or without surety, unless" a federal court "shall otherwise order." Even the *Carter* court recognized that where the applicant's future susceptibility to process is in question, release can be denied even if the state conviction for which the applicant is incarcerated is flawed. *Carter*, 781 F.2d at 997. No such exception would be acceptable if release were constitutionally mandated. Thus, it is clear that release is not required.

Moreover, continued detention pending appellate review of an order granting habeas corpus does not violate fundamental fairness. The fundamental fairness of detention, as a general principle, rests on two things: (1) whether there has been an adjudication of guilt in accordance with

due process; and (2) whether the detention constitutes punishment. Due process prohibits the imposition of *punishment* without a prior adjudication of guilt in accordance with due process of law. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). *See also Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-67 (1963); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896). In the case of a successful habeas applicant, the applicant has not only been indicted, based on probable cause that he has committed the crimes charged, but also has been found guilty beyond a reasonable doubt. Moreover, his status as a successful habeas petitioner also means that an adjudication of guilt has been reviewed by state appellate courts and found to be sound, constitutionally or otherwise. *See generally Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. sec. 2254. The granting of a writ of habeas corpus represents only the judgment of a federal district court that the petitioner's adjudication of guilt was constitutionally flawed. A state has the right to appeal this judgment. *See* 28 U.S.C. sec. 2253; *Fed. R. App. P.* 4(a). Since the constitutionality of the applicant's adjudication of guilt is still at issue, there is no fundamental unfairness to the continuation of punishment by virtue of staying release pending appeal. *See, e.g., Tate v. Rose*, 466 U.S. at 1304 (balancing the equities involved where a state sought a stay of an order granting release of a successful habeas petitioner, and determining that those equities tipped in favor of continuing confinement pending the resolution of the state's appeal from the issuance of the writ); *accord United States ex rel. Rice v. Vincent*, 486 F.2d at 216-17; *cf. California v. Prysock*, 451 U.S. 1301 (Rehnquist, Circuit Justice, 1981) (granting state's request for a stay of a state court judgment); *Fare v. Michael C.*, 439 U.S. 1310 (Rehnquist, Circuit Justice, 1978) (granting stay of a decision of the California court; stay granted after consideration of the "balance of equities" and the likelihood of a grant of *certiorari*); *Carbo v.*

United States, 82 S. Ct. 662 (Douglas, Circuit Justice, 1962) (reversing grant of bail pending appeal, even where defendant's success was likely, after considering the likelihood of retrial and defendant's dangerousness); *Leigh v. United States*, 82 S. Ct. 994 (Warren, Circuit Justice, 1962) (bail pending appeal may be denied where defendant presents a danger to the community).

While petitioners assert that staying a successful habeas applicant's release from custody pending federal appeal is a justifiable continuation of punishment, recent decisions of this Court suggest that detention under these circumstances does not constitute punishment and therefore does not implicate due process. This Court has recognized generally that not all sanctions, even those involving detention, constitute punishment. It has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may. *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. at 168; *Flemming v. Nestor*, 363 U.S. 603 (1960); *cf. DeVeau v. Braisted*, 363 U.S. 144, 160 (1960). In *Kennedy v. Mendoza-Martinez*, this Court described the factors traditionally used in determining whether a governmental act is punitive in nature:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Kennedy, at 168-69 (footnotes omitted). In *Bell v. Wolfish*, this Court described the distinction as one in which the court examining the challenged action "must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Bell*, 441 U.S. at 538. Absent a showing of an express intent to punish, this determination will generally turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Schall v. Martin*, 467 U.S. 253, 269 (1984) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-69).

In *Schall v. Martin*, this Court used the foregoing analysis to determine that the preventive detention of accused juveniles under the New York statute was not punishment. It not only examined the particular conditions and limitations of the detention but also noted the purpose of the detention—the protection of both the community and the juvenile from "the hazards of pretrial crime." 467 U.S. at 274. Similarly, in the context of an appeal of a decision to grant a writ of habeas corpus, where the defendant has been previously convicted of a crime involving dangerousness, continued detention seeks to curtail reasonably predictable conduct, not merely to punish for prior acts. *See United States v. Edwards*, 430 A.2d 1321, 1332 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982). Additionally, since the criteria urged by petitioners would combine dangerousness with a likelihood of the state's success on appeal, the detention would have the added purpose of maintaining control over the habeas applicant while the state vindicates the judgments of the state courts and the constitutional validity of his incarceration. *Cf. Fare v. Michael C.*, 439 U.S. at 21 (noting the significance of preserving the state's right to appeal a state court decision based on federal law).

In *Schall v. Martin*, this Court rejected the argument that using a prediction of dangerousness as a basis for detention was unfair because of the risk of error and noted that there was "nothing inherently unattainable about a prediction of future criminal conduct." 467 U.S. at 278. This Court has upheld the use of predictions of dangerous conduct in ways that impact on liberty interests in a number of other situations. In *Jurek v. Texas*, 428 U.S. 262 (1976), this Court upheld a state death penalty statute that allowed the jury to consider the likelihood that the defendant would engage in future anti-social conduct. The Court has also held that parole boards may properly attempt to predict dangerous behavior in making parole decisions in *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), and in *Morrissey v. Brewer*, 408 U.S. 471 (1972). Most recently, in *Barefoot v. Estelle*, 463 U.S. 880 (1983), this Court upheld the constitutionality of using the testimony of a psychiatrist at the penalty phase of a capital case which included a prediction that the convicted murderer was likely to engage in future violent conduct.

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system.

Jurek v. Texas, 428 U.S. at 274-76. There can be no better predictor of dangerousness than that which exists in this case—a state court jury has convicted the defendant of a crime of dangerousness. The fact that a district court has found a single infirmity in that conviction does not detract from this argument; the district court's finding is the subject of appellate review and may well be reversed.

In its due process analysis in *Schall*, this Court also considered whether the detention at issue served a legit-

imate state objective. *Schall*, 467 U.S. at 263. The Court found that the detention served a number of legitimate governmental interests not the least of which was the "legitimate and compelling state interest" in protecting the community against crime. *Id.* at 264-68 (quoting *DeVeau v. Braisted*, 363 U.S. at 155). In concluding that this interest, along with the state's interest in the protection of the accused juveniles themselves justified their limited detention, this Court answered the question it left open in *Bell v. Wolfish*: "whether any governmental interest other than ensuring a detainee's presence at trial may constitutionally justify pretrial detention." 441 U.S. at 534.

This same state objective to which this Court gave such importance in *Schall* applies equally when a district court decides whether to stay the release of a victorious habeas petitioner who is shown to be dangerous. The State's interest in protecting the community from the crimes likely to be committed by these individuals is but one of the many interests sought to be vindicated by the applicant's continued detention while the state appeals the district court's decision. While an adult's interest in liberty may not be subordinate in the same way *Schall* held that a juvenile's liberty interests are, by reason of his youth,[8] the adult detainee's interests are counterbalanced by the additional state interests implicated in a pending appeal of the grant of a habeas writ. The state has an especially keen interest in the vindication of the judgments of its courts through appeal of a grant of a habeas petition. Further, there is a strong interest in the maintenance of comity between the state and federal courts and in the finality of the criminal process. *See generally Murray v.*

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[8] In *Schall*, this Court found that the juvenile's interest in freedom from unconstitutional restraints was subordinated to the state's *parens patriae* interest in preserving and promoting the welfare of the juvenile. 467 U.S. at 265-67.

Carrier, ___ U.S. at ___, 106 S. Ct. at 2645. Where a federal district court unilaterally concludes that the judgments of an entire assemblage of state courts were wrong about the fairness of a habeas petitioner's trial, the public has a strong interest in seeing this district court judgment tested by the appellate process before a dangerous offender is allowed to return to the community.

Moreover, the societal interest in protection against crime does not vary in strength with the age of the person to be detained. If anything, the need to shield the community from crimes committed by adults who are released either pending trial or pending the state's appeal on a habeas decision is more compelling, since adults may have superior access to the means of committing more serious and far-reaching offenses. *United States v. Salerno*, 794 F.2d 64, 76 (2d Cir. 1986) (Feinberg, J., dissenting), *cert. granted*, ___ U.S. ___ (1986).[9]

Despite this Court's acceptance of using the likelihood that the detainee will commit further crimes as a criterion for detaining an individual, the court of appeals in *Carter v. Rafferty* simply dismissed the issue of dangerousness as an irrelevant factor in the equation of staying the release of a successful habeas applicant. In doing so it wrongly dismissed the state's paramount interest in protecting the community from crime. *Carter* completely overlooks the

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[9] In *United States v. Salerno*, 794 F.2d 64 (2d Cir. 1986), *cert. granted*, ___ U.S. ___ (1986), the Court of Appeals for the Second Circuit held that the federal Bail Reform Act of 1984 violated due process because it permitted pretrial detention on the ground of danger to the community. Petitioners observe that this Court recently granted *certiorari* in this case. Other circuits, however, have upheld the constitutionality of pretrial detention on grounds of dangerousness, finding no violation of due process in the use of dangerousness as grounds to deny bail. See *United States v. Portes*, 786 F.2d 758 (7th Cir. 1986); *United States v. Delker*, 757 F.2d 1390 (3d Cir. 1985). *See also United States v. Edwards*, 430 A.2d 1321 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982).

fairness of the detention at issue, both to the individual and to the state, and does not even attempt to reconcile its conclusion with this Court's due process analysis of detention in other contexts. Petitioners submit that the suggestion implicit in *Carter* that a successful habeas applicant is constitutionally entitled to be released is wrong. We assert that detaining a successful habeas applicant pending the appeal of the district court judgment on the grounds that he is dangerous and that the state is likely to succeed on the appeal does not defeat the principles of fundamental fairness as encompassed by the due process guarantee.

POINT III. THIS CASE SHOULD NOT BE DISMISSED AS MOOT BECAUSE IT IS 'CAPABLE OF REPETITION, YET EVADING REVIEW'.

This case involves a situation in which respondent has been released from state custody even though petitioners have appealed the district court decision which granted habeas corpus relief. Respondent has argued that this Court should not decide this case because it may become moot by virtue of a decision by the court of appeals prior to the time when a decision is reached by this Court. We respectfully suggest that the mootness doctrine is not applicable to this case, since this is a situation which will definitely be repeated but may always become moot before this Court has the opportunity to render a full opinion.[10]

It is undoubtedly true that under any of several scenarios this Court's final decision may not affect this particular respondent.[11] It is equally true, however, that if

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[10] We note that since respondent would have been required to serve at least seven more months of incarceration had the writ of habeas corpus not been granted, the case is not moot at the present time.

[11] There are three scenarios under which this case could become moot prior to the decision by this Court. The court of appeals could reverse

this Court were to declare this case moot and not reach a decision on this important issue for that reason, the issue may never be decided. This is due to the nature of the issue presented.

The dilemma presented in this case is real and is likely to recur. The issue of the standards for granting a stay

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the order of the district court which granted the writ of habeas corpus. Alternatively, the circuit court could reverse the order granting the writ and remand for further hearings before the district court. If either of these results are obtained, petitioners could immediately reincarcerate respondent. Of course, respondent could move for a stay of reincarceration under *Fed. R. App. P.* 23(b). In such a situation, there would be a presumption in favor of incarceration and the issues presented in this case would not be implicated. If respondent petitioned this Court for *certiorari*, he could move for continued release from custody under Rule 41 of the Supreme Court Rules. Again, the specific rule upon which this case is based, Rule 23(c) would not apply. If either of these eventualities occurs prior to a decision by this Court, this Court's opinion would not affect the outcome of this case. Still, as will be argued below, a decision should be reached on the issues presented in the petition for *certiorari*.

It is also possible that the court of appeals will affirm the district court order which granted habeas corpus. If petitioners decided not to petition for *certiorari*, the issue in this case would appear to be moot. Again, a decision on the issue presented in the petition would still be warranted.

If, on the other hand, petitioners decided to petition for *certiorari* from an adverse decision of the court of appeals, we could conceivably move before either the court of appeals or this Court under Rule 41(3) of the Rules of the Supreme Court to have respondent incarcerated. Since Rule 41(3) is identical to *Fed. R. App. P.* 23(c), moving before the court of appeals would be futile since the dictates of *Carter v. Rafferty*, 781 F.2d 993 (3d Cir. 1986) would still apply. A motion before this Court would have greater theoretical utility. Reaching decision on such a motion, however, would require this Court to determine the standards for permitting incarceration of a person who has obtained a writ of habeas corpus—the very issue presented in the present appeal. It would be more expedient for the Court to decide the issue within the context of the immediate appeal rather than to later decide the issue on the basis of a motion.

of release pending appeal following the grant of a writ of habeas corpus can, by definition, only be presented in a case in which one of the parties has taken an appeal on the underlying merit of the habeas corpus petition. The petition for *certiorari* from the grant or denial of the stay must be prepared simultaneously with the preparation of the court of appeals' brief on the merits. Indeed, in most cases the petition would not be due until after the court of appeals brief has been filed. *Cf.* 28 U.S.C. sec. 2101(c); 28 U.S.C. sec. 2107. The case will be fully briefed in the court of appeals before this Court even has the opportunity to decide whether to grant the petition for *certiorari*. Naturally, the case also will be ready for decision by the court of appeals before this Court has even received the briefs on the merits. Thus, the court of appeals will almost always reach a decision on the merits of the appeal before this Court will have the opportunity to set the standards for granting a stay pending that appeal. Failing to decide this issue on the basis of mootness would be the equivalent of determining that the issue will never be decided.

This scenario represents exactly what has happened in the present case. Respondent's writ of habeas corpus was granted on February 27, 1986 and became final 30 days from that date. (JA-3). A notice of appeal on the merits was filed on March 20, 1986. (JA-4 to 5). Petitioners' motion for a stay of respondent's release was denied by the district court on March 26, 1986. (JA-17 to 18). On May 16, 1986, petitioners moved before the Third Circuit Court of Appeals *en banc* for a stay of respondent's release. (JA-19 to 20). An order was entered denying this motion on May 27, 1986. (JA-21 to 22). Petitioners' appellate brief on the merits was filed on June 20, 1986. Respondent's brief on the merits was filed on July 24, 1986. The petition for *certiorari* from the Third Circuit's denial of a stay of respondent's release was filed on July 24, 1986. The responding brief was filed on September 8, 1986. A reply brief was filed on September 11, 1986. This Court granted

certiorari on October 14, 1986, and tentatively scheduled argument for the March 1987 calender. (JA-23). In the meantime, argument on the merits of the appeal to the Third Circuit was heard on October 27, 1986. Based on the Internal Operating Procedures of the Third Circuit,[12] an opinion will be filed *no later than* February 1987. Based on experience, an opinion can be expected well in advance of that date.

It is clear that the court of appeals will have the opportunity to decide the merits of the underlying habeas corpus petition before this Court can issue an opinion concerning the standards which should be applied in determining whether a stay of release should be granted. The facts of this case are not unique, however. It is often possible to obtain an opinion from the court of appeals in less time than it takes to obtain a full opinion from this Court.

It would, of course, have been possible for petitioners to have moved before this Court for a stay of respondent's release. Such a motion would have presented the same issues which were presented in the petition for *certiorari* and would have been decided before the Third Circuit issues its opinion on the merits. This procedure could be used in all future cases, thus avoiding the problem of mootness. Still, an approach of this type would not have solved the underlying problem. What is needed is not a piecemeal approach to erroneous factual determinations by the court of appeals, but rather, uniform and correct standards by which the lower courts can themselves resolve the factual disputes. Even if petitioners had moved before this Court for a continued incarceration pending appeal and such a motion had been granted, the standards enunciated in *Carter* would still be binding on the district courts. Only a full opinion by this Court can overrule this opinion. It

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[12] U.S. Ct. App. 3d Cir. I.O.P. ch.5 (Opinions), sec. 3 (1984).

is simply not possible to obtain such an opinion prior to the time at which the court of appeals will have the opportunity to decide the underlying case.

A finding that this Court's opinion may not affect this particular respondent does not end the inquiry. It is clear that a case in controversy existed at the time the petition for *certiorari* was filed, at the time it was granted and at the present time. Additionally, it is clear that in the event that this case becomes technically moot at some later date, it fully satisfies the "capable of repetition, yet evading review" exception to mootness.

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court noted that "[t]he usual rule is that an actual controversy must exist at all stages of appellate or certiorari review, and not simply at the date the action is initiated." *Id.* at 125. The Court went on to note, however, that the law should not be so rigid as to deny adjudication of an issue which is truly "capable of repetition, yet evading review." *Id.* This is such a case.

There can be no doubt that the situation in this case is likely to recur. Indeed, it will inevitably recur. Criminal defendants who have committed serious crimes will continue to petition for habeas corpus relief. Some of these defendants will obtain relief. These cases often involve important constitutional issues. (In fact, relief in the habeas context can only be granted if the constitution, laws or treaties of the United States have been violated. 28 U.S.C. sec. 2254(a)). Many of these cases involve questionable decisions which are worthy of appellate review and may well be subject to reversal. Moreover, the defendants involved in these cases frequently pose a danger to the community if released. Yet, under the opinion in *Carter*, their release can be stayed pending appeal only if it can be shown that they are likely to flee. It is certain that this scenario will be repeated in future cases if a decision is not rendered in the present case. In fact, this

very case simply repeats the problem first encountered in *Carter*.

Petitioners recognize that this Court has set forth strict limits to the "capable of repetition, yet evading review" exception to the mootness doctrine. This case falls within these limits. In *Murphy v. Hunt*, 455 U.S. 478, 482 (1982), the Court followed *Weinstein v. Bradford*, 423 U.S. 147 (1975), which stated:

> in the absence of a class action, the "capable of repetition, yet evading review" doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

423 U.S. at 149.

In *Murphy*, the criminal defendant had brought a 42 U.S.C. sec. 1983 action seeking declaratory and injunctive relief of state trial court orders denying him pretrial bail. His trial was completed prior to any action by the district court. 455 U.S. at 480. The court of appeals declared that the case was not moot because defendant's convictions might be overturned on appeal and he might be again subject to pretrial detention without bail. This Court reversed the court of appeals, holding that the "capable of repetition yet evading review" exception to the mootness doctrine did not apply since the possibility of repetition of the same injury to the same party was so theoretical. *Id.*

In *Lane v. Williams*, 455 U.S. 624 (1982), defendants pled guilty to burglary, but were not informed that their sentences would involve mandatory parole terms. They filed petitions for habeas corpus requesting specific performance of these negotiated pleas. This relief was granted by the district court. On appeal, the matter was remanded on

exhaustion grounds. Prior to the district court rehearing, both defendants were released from prison; therefore, the district court simply entered an order declaring defendants' parole ineligibility terms void. The state appealed the district court decision and the court of appeals affirmed, ruling that the case had not been made moot by defendants' release from custody. On *certiorari* review this Court vacated the judgment of the court of appeals and ordered that the case be dismissed as moot. This Court reasoned that since the district court's final opinion could not have provided the relief requested by the defendants (release from the parole ineligibility term), and since there was no reason to expect that the injured party (defendants) would again be subjected to the same action, the "capable of repetition, yet evading review" doctrine should not have been applied. 455 U.S. at 633-34. Since the case should have been dismissed at the district court level, no valid underlying order existed from which to appeal.

In the present case, the injured party, the State of New Jersey, is susceptible to future injury and that injury is not speculative. The *Carter* case amply demonstrates the likelihood that petitioners will be exposed to the same injury again. It is not speculation to assume that the same circumstances will occur repeatedly. *Vitek v. Jones*, 455 U.S. 480, 486-87 (1980); *Prieser v. Newkirk*, 422 U.S. 395, 402 (1975); *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). Moreover, as has previously been demonstrated, the harm presented in a case such as this one is not preventable by any action which the injured party can take. *Cf. United States v. Munsingwear*, 340 U.S. 536, 539-40 (1950).[13]

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[13] Even if this Court finds that petitioners conceivably could have taken some action which could have ensured review by this Court prior to a decision on the merits by the court of appeals, we suggest that a decision should be reached in the present case. Clearly this case was not moot at the time the petition was granted and is not yet moot.

In addition, it must be noted that the time duration of the challenged action, *e.g.*, the time which elapses from the granting of a writ of habeas corpus to resolution of the case by the court of appeals, is too short to permit the issue of the standard involving stays pending appeal to be fully litigated prior to the action's expiration due to a decision by that court.

Based on these arguments, petitioners suggest that even if at some future date this case becomes moot because of the action of the court of appeals, it would still come within the capable of repetition, yet evading review exception to mootness. Therefore, this Court should properly decide the issue presented in the petition for *certiorari*.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the order of the United States Court of Appeals for the Third Circuit denying petitioners' request to stay respondent's release during the pendency of the State's appeal be reversed.

In all cases concerning this issue, mootness will be determined by the speed with which this court and the court of appeals render their respective decisions. To require petitioner to release other prisoners, perhaps more dangerous than respondent, in order to engage in a race with the court of appeals would be improper.

Respectfully submitted,

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Dated: November 26, 1986